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No. 318

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 73–80) are reported at 197 F. 2d 111. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 7–36) are reported at 95 NLRB 336.

JURISDICTION

The opinions of the Court of Appeals were filed on May 12, 1952, and its decree was entered on August 8, 1952 (R. 81). A motion to extend until September 9, 1952, the time for filing the petition for certiorari was granted by Mr. Justice

Clark on August 1, 1952 (R. 83). The petition for writ of certiorari was filed on September 5, 1952, and granted on October 27, 1952 (R. 84). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer violates Section 8 (a) (1) and (3) of the National Labor Relations Act by discharging an employee for refusing, during the course of his employment, to cross the lawful picket line of a labor organization of which he is not a member at the premises of one who supplies goods to the employer.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151, *et seq.*), and of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 67–72. The pertinent provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C., 101, *et seq.*), referred to in this brief, are likewise reprinted in the Appendix, *infra*, pp. 72–73.

STATEMENT

1. THE FACTS

Upon the usual proceedings under Section 10 of the Act, the Board, on July 20, 1951, issued its findings of fact, conclusions of law, and order

(R. 7–36). The facts, which are not in dispute, may be summarized as follows:

Charles Waugh, the employee whose discharge on March 7, 1950, gives rise to this proceeding, had been employed by respondent as a chauffeur and routeman for about seven years (R. 19; 40).[1] He was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity, which had for some years been contractually recognized by respondent as the exclusive bargaining representative of its employees (R. 19; 49, 56–60).

Working five days a week (Tuesday through Saturday), from 9:45 a. m. to 6:30 p. m., Waugh's duties consisted of driving a truck along a regularly assigned route and picking up and delivering various newspapers and other publications (R. 20; 42–43). Among his scheduled stops was one at the plant of the Daily Review Corporation, Rockville Center, Long Island, New York, publisher of the Nassau Daily Review Star. Before 10:30 a. m. on each of his working days except Saturday, Waugh was required to stop there and pick up a supply of Review Stars for delivery at subsequent points on his route (R. 20; 42, 43, 47). This operation con-

[1] Where a semicolon appears in a series of record references in this Statement, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

sumed about 10 minutes of each working day on which it was required (R. 20; 49).

On the morning of Thursday, March 2, 1950, before beginning work, Waugh learned that the Nassau County Typographical Union had placed pickets before the premises of the Daily Review Corporation (R. 20; 44). Through a telephone call to John J. Byrnes, Vice President of the Typographical Union, he was apprised that this labor organization had ordered the picketing in the prosecution of a long-standing labor dispute with the Daily Review Corporation (R. 20; 44–45, 50, 52).

Convinced that the Typographical Union, of which he was not a member, was maintaining "a legal picket line," Waugh went to his foreman, William Gordon, and said that he, "as a union man, would not cross that union picket line and thereby become a scab or a strikebreaker" (R. 20; 45). Gordon replied: "Charlie, I wouldn't take that attitude. It might mean your job" (*ibid.*). But Waugh reiterated his position, insisting that he had a "right as a union man" not to "harm another union" and suggesting that copies of the Review Star be brought to him in some way which would not entail his crossing the picket line (R. 20–21; 45).

Accepting this suggestion for the moment, respondent arranged to have its consignment of Review Stars brought on that day to its plant at Valley Stream, from which point Waugh took

them and proceeded on his route as usual (R. 21; 45–46). Again on the next day, Friday, March 3, respondent had the papers brought to Waugh outside the picket line (R. 21; 46–47). On Tuesday, March 7, however, the next day on which Waugh's duties included picking up copies of the Review Star, Foreman Gordon told him that no arrangements like those of the preceding Thursday and Friday would be made and that respondent expected him to cross the picket line. "Otherwise," Gordon said, "You are fired; if you refuse, you are fired" (R. 21; 47–48). Persisting in his refusal to cross the picket line, Waugh left respondent's premises (R. 21; 48).

On the following day, Waugh returned to ask for work, but Gordon told him: "You know I can't hire you. You're fired." On each succeeding day for about three weeks Waugh requested in vain that respondent hire him (R. 21; 48–49).

Unlike Waugh, other members of the Newspaper and Mail Deliverers' Union did not refuse to cross the Typographical Union's picket line. The picketing members of the latter union expressed their resentment against such action on the two days following Waugh's discharge by carrying placards which read: "Is Waugh the only union mail deliverer?" (R. 21; 55–56).

The legality of Waugh's discharge was thereafter submitted to an arbitration board, under the terms of a contract between the respondent and

Waugh's union (R. 70). The arbitration board held that Waugh had violated Section 4 of the contract, dealing with the right of foremen to issue orders, and dismissed the grievance (R. 69, 25–26).

2. THE BOARD'S CONCLUSIONS AND ORDER

Noting that the picketing of the Daily Review Corporation was a legitimate activity by the Typographical Union, the Board held that Waugh had a right, guaranteed by Section 7 of the Act, to refuse to cross the picket line. Accordingly, the Board concluded, Waugh's discharge for this protected activity was violative of Section 8 (a) (1) and (3) of the Act (R. 8–10, 28–30).

It was immaterial, the Board held (R. 9–10), that Waugh was not a member of the picketing union, for in "refusing to cross the Typographers' picket line [he] was making common cause and acting in concert with the Typographers." And, the Board pointed out (R. 10), the safeguards of Section 7 extend to employees who participate in such activities whether or not they are members of the union directly involved—"or indeed, of any union * * *."

The Board rejected (R. 8–9) respondent's contention that Waugh's refusal to cross the picket line constituted a "partial strike" outside the protection of the Act. The record showed, the Board pointed out, "that Waugh's failure to perform part of his duties was not occasioned by an

insubordinate refusal to perform work tasks assigned to him by the Respondent, an unwillingness to comply with its rules, or a desire unilaterally to impose or alter his own terms and conditions of employment while remaining at work." In *Cyril de Cordova & Bro.*, 91 NLRB 1121, the Board had observed that a refusal to cross a picket line was a traditional kind of action, "time-honored in the history of the American labor movement," and, that an employee's refusal to perform such of his duties as entail dishonoring a picket line is "not a wilfully contrived violation of plant discipline as a means to an end" but, "rather, a necessary and unavoidable incidental effect of a form of concerted action undertaken in a conventional and traditional manner." 91 NLRB, at 1136. The same analysis, the Board concluded, applied in the instant case. "Respondent, as a normal incident of its right to maintain its operations, could have required Waugh to elect whether to perform all his duties, or, as a striker, to vacate his job and make way for his replacement by the Respondent" (R. 9). It could not, as it had chosen to do, simply discharge him for engaging in an activity protected by the Act.

The Board also rejected (R. 8, 30–32) respondent's argument that its contract with the Newspaper and Mail Deliverers' Union justified Waugh's discharge because (1) Waugh's refusal to cross the picket line was a violation of the

contract's no-strike provision and (2) the Adjustment Board, created by the contract to resolve disputes thereunder, had held the discharge proper. In *Rockaway News Supply Company, Inc.*, 94 NLRB 1056, the Board had found that this identical contract, which contained an unlawful union-security agreement and in other respects discriminated against nonmembers of the union, was illegal in its entirety and should be given no effect.[2] Accordingly, the Board held here that respondent could not rely on its unlawful agreement, an instrument of unlawful support rendered to the union with which the agreement had been made, as authority for its discrimination against Waugh.

The Board therefore ordered respondent to cease and desist from its unfair labor practices, to reinstate Waugh with back pay, and to post appropriate notices (R. 10–14).

3. THE DECISION OF THE COURT BELOW

The court below, Judge Clark dissenting, set aside the order of the Board. Recognizing that

[2] The Board reached the identical conclusion with regard to an identical contract in *Gaynor News Co.*, 93 N. L. R. B. 299. This conclusion, approved by the Court of Appeals which entered a decree enjoining that company from "performing or giving effect to [that] contract" in *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719 (C. A. 2), was not challenged in the petition for certiorari filed in that case, pending as No. 371, this Term. Enforcement proceedings against respondent in the case cited in the text above have not yet been instituted; they await the ultimate determination of the issues in the *Gaynor* case.

"the refusal of an employee to cross a picket line of another union than his own at another plant than that of his employer is an exercise of the right 'to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection' which is expressly guaranteed by Section 7 of the Act," the court observed that "such refusal is habitual with union workers," that "it is frequently of assistance to the labor organization whose picket line is respected," and that "it is in a broad but very real sense directed to mutual aid or protection" (R. 75). The court held, however, that this right, like the right to solicit union membership on company property, enjoys statutory protection only during non-working hours, for "To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment * * *" (R. 76).

As a further basis for its decision, the court stated that the Board was "unrealistic" in holding that Waugh could have been treated as an economic striker and replaced, but could not lawfully be discharged (R. 78). It would be pointless, the court held, merely to permit the employer to place Waugh in the position of a total striker, since, in its view, his Union would be precluded by Section 8 (b) (4) (A) from supporting him in such a strike. Consequently, the court stated, Waugh's strike would have been foredoomed to failure, and since his employer would have been

free to replace him had he gone on strike, the court saw no statutory violation in discharging him.

Finally, the court noted that although it had assumed that Waugh's refusal to cross the picket line was intended to aid the striking union, it felt that "on the evidence in this case that fact is very doubtful" (R. 78–79), since Waugh was willing to distribute the papers if someone else crossed the picket line to obtain them, and appeared to be concerned only with his own standing as a union man.[3]

Judge Clark, dissenting, was of the view that the Board acted within the intended spirit of the proviso to Section 8 (b) (4), which protects the refusal of "any person" to enter upon the premises of an employer other than his own when the employees of that employer are engaged in an authorized and lawful strike. Noting that this proviso was not involved in *National Labor*

[3] The court below did not pass upon respondent's contention that Waugh's refusal to cross a picket line violated the no-strike clause in the contract between respondent and Waugh's union. As the dissenting Judge observed, the Board having correctly set aside the entire contract because it contained an illegal union-security clause as well as other evidence of illegality, that issue "has thus been properly removed from the case" (R. 80). See n. 2, *supra*. Moreover, even the Arbitration Board functioning pursuant to the contract did not find that the refusal to cross a picket line violated the no-strike clause; it held only that the discharge was justified under the contractual provision dealing with the power of the foremen to issue orders (R. 69, 25–26).

Relations Board v. *Illinois Bell Telephone Co.*, 189 F. 2d 124 (C. A. 7), certiorari denied, 342 U. S. 885, which arose prior to the enactment of Section 8 (b), Judge Clark stated that in protecting such a refusal only outside working hours, the holding of the majority amounted to "a practical nullification of the statutory provision" (R. 80). The dissent also noted that in rejecting as "unreal" the Board's view that Waugh could not be discharged prior to being replaced, the majority departed from the settled rule, "explained clearly and succinctly in *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 9 Cir., 193 F. 2d 748, 750" (*ibid.*), that economic strikers, although vulnerable to replacement, may not lawfully be discharged for striking.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that Section 8 (a) (1) and (3) of the Act does not protect an employee from discharge for refusing, during the course of his employment, to cross a lawful picket line of a labor organization of which he is not a member at the premises of his employer's supplier.

2. In not enforcing the order of the Board.

SUMMARY OF ARGUMENT

A

As the court below recognized, an employee who refuses to cross a lawful picket line at the

plant of his employer's supplier thereby "assists" the striking labor organization, and acts in "concert" with the strikers "for mutual aid" within the meaning of Section 7 of the original and the amended Act. Contrary to the view of the court below, however, the protection against discharge provided by Section 7 extends to employees who respect such a picket line during, as well as outside, their regular working hours. Sections 2 (3) and (9) of both the original and the amended Act, defining "employee" and "labor dispute," respectively, establish that one who ceases work because of a labor dispute remains an "employee" entitled to the rights guaranteed in Section 7, even though the labor dispute is one to which neither he nor his employer is a party. The history of these definitions, which grew out of Congress' determination to overturn such decisions as *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, establish that Congress intended to protect precisely the traditional tactic of organized labor which is here involved.

B

The 1947 amendments to the Act, although they imposed restrictions on sympathetic action by labor unions, did not represent a full return to the philosophy of the *Duplex* case in this regard. On the contrary, Congress in the amended Act left unchanged the definitions of "employee" and "labor dispute," thereby continuing to reject the

view that employees should enjoy statutory protection only when they cease work because of a dispute with their own employer. The amended Act outlaws secondary boycotts, but leaves unaltered the right of labor organizations to engage in primary picketing (*National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665), and the corollary right of employees of other employers to respect a primary picket line. Indeed Congress specifically provided in the proviso to Section 8 (b) (4) of the amended Act that its prohibitions were not to be read as extending to an employee's refusal during the course of his employment to cross a lawful picket line at the plant of his employer's supplier. Moreover, in the amended Act Congress prohibited a labor organization from coercing an employee into respecting a picket line, by providing that the employee had a right "to refrain from" exercising the rights guaranteed by the Act. The employee's freedom to cross or not to cross the picket line is therefore protected against reprisal from the union or the employer.

C

The court below misread this Court's decision in *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, as laying down a rule that the rights guaranteed in Section 7 are to be protected only outside working hours. The rule of the *Republic* case is that the employee

rights guaranteed in Section 7 must be balanced against an employer's right to continue production in such a way as to afford ample protection to both. The *Republic* case approved the Board's conclusion that the right to solicit union memberships, though limited to nonworking hours in the interest of efficient production, remains adequately protected because nonworking time affords ample opportunity for its exercise. However, the right of an employee to respect a picket line is virtually destroyed if it is subjected to that limitation; outside working hours the right can be exercised by employees only acting as consumers and never as employees. The proper balance to be struck in this case is to treat the employee who refuses to cross the picket line as occupying the same legal status as an economic striker. Under settled law, an employer may *replace* such a striker in order to continue production, but he may not penalize the striker for exercising his rights by *discharging* him before he is replaced.

The distinction between immunity to discharge and vulnerability to replacement is firmly settled in the law, and is indeed at the very heart of the concept of "protection" which the Act accords to employees who cease work in consequence of a labor dispute. The court below suggested, however, that in the present case the distinction between "discharge" and "replacement" was "wholly unrealistic," because in its view Waugh's union could not lawfully have supported his

"strike," and it would have been foredoomed to failure. But it is not clear, as the court below assumed, that Section 8 (b) (4) prohibited Waugh's union from encouraging Waugh's fellow employees to respect the picket line as he did. In any event, statutory protection against discharge for engaging in a protected activity is not limited to instances in which the activity has even a fair chance of success.

Finally, the court below urged that to extend protection to an employee who refused to cross a picket line during working hours "would be to permit an employee unilaterally to dictate the terms of his employment." Waugh's refusal to cross a picket line, however, was not intended to effect any change in the terms of his employment, but only to assist the striking union. Consequently the "partial strike" case relied on by the court below are not in point, for in those cases the employees sought to enforce their own demands by refusing to work except under the very terms on which they were insisting. The question whether a strike or other concerted activity enjoys statutory protection turns not upon whether it is conducted outside working hours, nor on whether it results in a complete, as distinguished from a partial, cessation of work, but on whether the means by which it is conducted, and the end it envisages, are lawful. In the instant case Waugh's refusal to cross the

picket line was the normal traditional method by which a union man assists another union and acts in concert with the strikers, and the legality of his objective is beyond dispute. It follows that the normal protection which, as the court below conceded, Section 7 extends to employees who respect a picket line during nonworking hours, extends as well to employees who exercise the same right during working hours.

ARGUMENT

AN EMPLOYER VIOLATES THE NATIONAL LABOR RELATIONS ACT BY DISCHARGING AN EMPLOYEE BECAUSE THE EMPLOYEE HAS REFUSED, IN THE COURSE OF HIS EMPLOYMENT, TO CROSS A LAWFUL PICKET LINE AT THE PLANT OF THE EMPLOYER'S SUPPLIER

The present case concerns one of the basic traditions of the organized labor movement—the tradition that a union man will not cross a lawful picket line maintained by his own or another union. The issue here presented is whether and how far the National Labor Relations Act, as amended, protects the right of an employee to adhere to that tradition by refusing to cross a picket line on the premises of his employer's supplier. The court below recognized that the right so to refuse is protected by the Act. But it limited that protection to nonworking time. Thus limited, the right all but vanishes. We believe that the exercise of that right is protected at all times, and that the discharge of the employee here for exercising that right during work-

ing hours was an unlawful interference with that right in violation of section 8 (a) (1) and (3) of the Act. We believe that Congress explicitly so determined in the Wagner and Taft-Hartley Acts; alternatively, if the reconciliation of the employee's right with the rights of his employer is left open in this situation, we believe that the court below erred in rejecting the rule which the Board adopted.

A. UNDER THE WAGNER ACT REFUSAL TO CROSS A PICKET LINE WAS A PROTECTED ACTIVITY

1. *The pertinent statutory provisions define the scope of employee activity protected against discharge.*—The legislative pattern of the Wagner Act, which was not materially changed in this regard by the Taft-Hartley amendments, establishes a broad category of activities in connection with self-organization, collective bargaining and labor disputes in which employees have a right to engage (Section 7, original and amended Act). Congress provided in Section 8 (1) of the Act (Section 8 (a) (1) of the Act, as amended), that it should be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In Section 2 (3) of both the original and the amended Act Congress stated that the "term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly

states otherwise," and further defined the term "employee" to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." Finally, in Section 2 (9) of both the original and the amended Act Congress defined the term "labor dispute" to include any controversy involving representation, or terms, tenure or conditions of employment "regardless of whether the disputants stand in the proximate relation of employer and employee."

It is within the context of this statutory scheme that the legality of Waugh's discharge by his employer must be judged. Waugh was discharged because, in consequence of a then current labor dispute between Nassau County Typographical Union and the Daily Review Corporation, he ceased and refused to perform certain work required by his employer, namely, to enter the premises of the Daily Review Corporation and there pick up a supply of *Review Stars* for subsequent delivery. By the plain terms of Sections 2 (3) and (9) this refusal to render services did not remove Waugh from the Act's protection. Since his refusal to work was entirely a consequence of, and entirely limited to, the current labor dispute between Daily Review Corporation and the Typographical Union, he remained throughout an "employee," entitled to the protection of Section 7. Accordingly, if the type of activity in which Waugh engaged falls within the

category of activities enumerated in Section 7, Waugh's discharge for engaging in it was unlawful, for an employer may not discharge an employee for engaging in activities which Section 7 protects. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45–46; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132; *National Labor Relations Board* v. *Phoenix Mut. Life Insurance Co.*, 167 F. 2d 983, 988 (C. A. 7), certiorari denied, 335 U. S. 845; *National Labor Relations Board* v. *Schwartz*, 146 F. 2d 773, 774 (C. A. 5).

2. *Refusal to cross a picket line is an act of "assistance" to a labor organization, and a "concerted activit[y] for * * * mutual aid" within the meaning of Section 7.*—We turn first to the language of Section 7, to determine whether Waugh's conduct falls within its scope. In addition to its guarantee of the right to form and join labor organizations, and to bargain collectively through freely chosen representatives, Section 7 of the Act guarantees to employees the right "to assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * mutual aid or protection." It is hardly open to controversy that when an employee refuses in the course of his employment to cross a picket line at the plant of another employer who is involved in a labor dispute, the employee thereby "assists" the labor organization in its dispute with that employer. Indeed, the request

for precisely such assistance, implicit in every picket line, is perhaps the most common and traditional concomitant of a strike. In the words of this Court, it is "traditional and permissible in a primary strike" for pickets at an industrial plant "to influence * * * employees of a customer of the [picketed employer] not to cross the picket line." *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 687.

The response of the customer's employees, particularly when they are members of labor organizations, to such an appeal for assistance is equally traditional.[4] As the Court of Appeals for the Ninth Circuit has stated: "The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate

[4] See *Report of the General Executive Board to the 27th Convention, International Ladies' Garment Workers Union*, Atlantic City, N. J., May 23–June 1, 1950, pp. 691–692:

"Your committee is keenly aware of the great role that respect for a picket line has played in the history of the labor movement. It is a tradition that emerged with the very first beginnings of labor organization and that has done much to foster the spirit of labor solidarity, which alone gives trade unionism whatever power it possesses. Respect for a picket line still remains a sacred and inviolable sentiment among the best of the many millions of men and women who make up the army of organized labor. It constitutes a weapon and a sanction that labor can never outgrow since it can never outgrow the idea and practice of labor solidarity that gives it its life."

if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.'" *Printing Specialties Union* v. *National Labor Relations Board*, 171 F. 2d 331, 334, petition for certiorari dismissed, 336 U. S. 949.

The nature and motive of the pickets' appeal and of the response thereto demonstrate, we believe, not only that refusal to cross a picket line is a most obvious act of "assistance" to a labor organization, but that it is also a form of "concerted activities for the purpose of * * * mutual aid or protection." Manifestly, when pickets invite employees of customers to refrain from crossing the picket line they are inviting those employees to make common cause with them, to withhold their services from the picketed employer just as the strikers are withholding theirs, and to the same end: to induce the picketed employer to yield to the union's demands. When those employees accept this invitation by refusing to cross a picket line, they thus act in "concert" with the pickets and with the employees they represent, in the most obvious and literal sense.[5]

[5] This is not to say, of course, that employees who refuse to cross picket lines necessarily act in concert with other employees of their own employer. See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 670–671. But concert in this sense, *i. e.*, between employees of the same employer, is manifestly unnecessary to establish the existence of concerted activity protected by Section 7. See Sections 2 (3) and (9), discussed, *infra*, pp. 25–32. In any event, even the existence of "concert" as between the pickets and the customer's employees is unnecessary to establish that

That the customer's employees who refuse to cross such a picket line may have no immediate stake in the outcome of the labor dispute between the supplier and his employees does not, of course, establish that their refusal is not "for the purpose of * * * mutual aid or protection." In his classic opinion for the court in *National Labor Relations Board* v. *Peter Cailler Kohler Co.*, 130 F. 2d 503, 505–506 (C. A. 2), Judge Learned Hand said:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most sense, as nobody doubts.

Judge Hand then added, in language particularly significant here:

> So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who

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the employees who refuse to cross are protected. Their conduct is plainly "assistance" to the striking labor organization, and "assistance" is protected whether accorded individually or in concert.

will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in "mutual aid or protection." Cf. *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board*, 7 Cir., 111 F. 2d 869, 873, 874. *It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained* (*e. g., Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 471, 472, 474 * * *), *but it seems to us that the* [*Wagner*] *act has put an end to this.* [Italics supplied.]

The evidence in this record confirms what the foregoing discussion establishes in general, namely, that an employee who refuses to cross a picket line at the premises of his employer's supplier does so to "assist" the picketing union in its labor dispute, and by thus allying himself with the union engages with it in a "concerted activit[y] for the purpose of * * * mutual aid or protection." Waugh himself stated, at the time, that refusal was motivated by his determination not to "harm another union" (R. 45). The striking union made it abundantly clear that one of the purposes of its picket line was to prevent Waugh and his fellow employees from obtaining papers from the Daily Review plant, and that insofar as Waugh furthered this purpose he "as-

sisted" the striking union. The placards carried by the pickets, "Is Waugh the only union mail deliverer?" (R. 55), were calculated to inspire Waugh's fellow employees to assist the striking union, as Waugh had assisted it, by refusing to cross the pocket line.[6]

Moreover, in making common cause with the strikers, Waugh was clearly interested in promoting solidarity with employees in an enterprise closely interrelated with his own. The strikers he supported were involved in the newspaper industry, the same industry which Waugh served as a routeman. Aware of the connection between his employment in distributing newspapers and the work of producing them, he had sought, prior to the events of this case, to organize the Daily Review Corporation's employees in the union of which he was a member (R. 49). Although his effort had been unsuccessful, his respect for their picket line in this case was obviously a means of seeking potential, if not immediate, benefits for himself as well as for the striking union.

3. *Sections 2 (3) and (9) of the Act show that*

[6] Respondent urged that because Waugh was willing to deliver the papers if someone else crossed the picket line to obtain them, he was not really assisting the strikers. But the fact remains that Waugh's action gave the striking union some assistance, as he intended and as the strikers acknowledged; the fact that he could have rendered further assistance is no basis for withdrawing statutory protection from the assistance he saw fit to give.

the protection of Section 7 cannot be denied to an employee who refuses, in the course of his employment, to cross a picket line at the plant of his employer's supplier.—The court below agreed that refusal to cross a picket line was "frequently of assistance to the labor organization whose picket line was respected" and that it was a concerted activity for mutual aid (R. 75) which was protected by Section 7. It held, however, that this activity was not protected when it occurred during working hours and thus involved a refusal by the employee to perform services for his employer (R. 76). This limitation reads Section 2 (9) entirely and Section 2 (3) largely out of the Act. The very purpose of those provisions was to protect employees who cease work in support of another labor organization in whose dispute neither they nor their employer have an immediate interest. To deny protection to such activity simply because it involves a work stoppage is to frustrate the clear will of Congress.

(a) *The function of Sections 2 (3) and (9) is,* inter alia, *to extend the protection of Section 7 to employees who cease work in consequence of a labor dispute to which neither they nor their employers are immediate parties.*—Read together, Sections 7 and 8 (a) (1) establish, as we have shown, that employees are not to suffer job reprisals for engaging in the class of activities comprehended by Section 7. In Section 2 (3) and

(9) Congress defined the category of "employees" upon whom the protection of Section 7 was conferred. Guarding against the possibility that employees would be protected in exercising the rights conferred upon them by Section 7 only insofar as they sought self-organization or collective bargaining from their own employer, Congress first declared that the term "employee" shall "include any employee, and shall not be limited to the employees of a particular employer." By virtue of this provision employees have been held to be protected against discharge by their own employer for acting as bargaining agents for employees of other employers (*Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board,* 111 F. 2d 869, 873–874 (C. A. 7)); for supporting those who are engaged in organizational activity among employees of other employers (*National Labor Relations Board* v. *J. G. Boswell Co.,* 136 F. 2d 585, 594–596 (C. A. 9)); or for publishing broadsides castigating their employer for supporting the stand of another employer who is engaged in a labor dispute (*National Labor Relations Board* v. *Peter Cailler Kohler Co.,* 130 F. 2d 503 (C. A. 2)).

In addition, Congress guarded against the possibility that protection would be denied to employees whose exercise of rights guaranteed by Section 7 involves cessation or refusal to work. Thus, Congress declared that the "term 'employee' shall include * * * any individual

whose work has ceased as a consequence of, or in connection with, any current labor dispute." See, S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6–7. It is settled that the effect of this clause is to protect the right to strike (*National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 345; *Bus Employées* v. *Wisconsin Board*, 340 U. S. 383, 389), and to assure that an employer may not discharge or otherwise penalize employees because they have engaged in a lawful strike.

Finally, further to guard against the possibility that this protection would extend only to employees who cease work in support of a labor dispute involving their own employer, the term "labor dispute" was defined broadly to include

[7] See also, *American Mfg. Co.*, 5 N. L. R. B. 443, enforced, 106 F. 2d 61, 67–68 (C. A. 2), affirmed, 309 U. S. 629; *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 718 (C. A. 8); *National Labor Relations Board* v. *Western Cartridge Co.*, 139 F. 2d 855, 858 (C. A. 7); *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 284–285 (C. A. 4), certiorari denied, 332 U. S. 758; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176 (C. A. 3); *National Labor Relations Board* v. *Remington Rand*, 94 F. 2d 862, 871 (C. A. 2), certiorari denied, 304 U. S. 576; *Berkshire Knitting Mills* v. *National Labor Relations Board*, 139 F. 2d 134, 140–141 (C. A. 3), certiorari denied, 322 U. S. 747; *National Labor Relations Board* v. *Ohio Calcium Co.*, 133 F. 2d 721, 726 (C. A. 6); *National Labor Relations Board* v. *Clinton Woolen Mfg. Co.*, 141 F. 2d 753, 756 (C. A. 6); *United Aircraft Mfg. Co.*, 1 N. L. R. B. 236, 252; *Columbia Pictures Corp.*, 64 N. L. R. B. 490, 514–515.

any dispute involving representation, or terms or conditions of employment, "regardless of whether the disputants stand in the proximate relation of employer and employee" (Section 2 (9)).

(b) *The origins of Section 2 (3) and (9) establish that Congress deliberately intended to extend the protection of Section 7 to employees who engage in sympathetic work stoppages to assist labor organizations in disputes with employers other than their own.*—It was only natural that, in framing a statute which was designed to restrict the power of employers to impede activities in support of collective bargaining, the Congress which drafted the Wagner Act should thus seek to guard against possible restrictions which would have denied the protection of the Act to employees who engaged in sympathetic activities in support of other workers, such as sympathetic strikes, secondary boycotts and refusals to cross picket lines. Whether federal legislation protecting labor's concerted activities extended to such sympathetic action had for years been the core of labor law controversy in this country.

At bottom had been the failure of the courts to recognize that "just as conditions of labor in one shop react upon conditions of labor in another shop of the same craft, so conditions of labor in the craft as a whole influence labor conditions in

other but allied crafts."[8] As a result of the failure to acknowledge the interest of persons employed by other employers in the working conditions of employees engaged in the same industry, the courts, federal as well as state, traditionally enjoined employees from striking in support of their fellows. Congress, long conscious of abuses in issuing such injunctions, endeavored to correct the situation in the Clayton Act. But in *Duplex Printing Co.* v. *Deering,* 254 U. S. 443, 472, a majority of this Court held that the Clayton Act did not extend "beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of the dispute." See also *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37.

Thereafter, Congress, "to escape the effect of the *Duplex* and *Bedford* decisions, passed the Norris-LaGuardia Act * * *. This congressional purpose found further expression in the Wagner Act * * *." *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 805. The direction in Section 2 (9) of the Wagner Act that the phrase "labor dispute" not be read as limited to cases in which "the disputants stand in the proximate relation of employer and employee" is identical with and was taken from the same language in Section 13 (c) of the Norris-LaGuardia Act (29 U. S. C. 113). See S. Rep. 573, 74th

[8] Frankfurter & Greene, *The Labor Injunction* (1930), p. 216.

Cong., 1st Sess., p. 7. And that language was used for the specific purpose of altering the rule announced in the *Duplex* case. *Allen Bradley* case, *supra*; see also, *United States* v. *Hutcheson*, 312 U. S. 219, 230–231; H. Rep. 669, 72d Cong., 1st Sess., pp. 7–8, 10–11.

In the Norris-LaGuardia Act, the definition of "labor dispute" was designed to describe the area in which the power to grant injunctive relief was withdrawn, and thus to assure that employees could not be enjoined from ceasing work in support of employees of other employers.[9] In the Wagner Act, of course, the definition served a different purpose, namely, to establish the applicability of Section 7, and thereby to assure that

[9] The definition in the Norris-LaGuardia Act of a "case" involving or growing out of a "labor dispute" (Section 13 (a)) confines the area of nonenjoinable conduct to disputes which involve "persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein." Section 13 (b) of that Act defines "person * * * participating or interested in a labor dispute * * *" as anyone who is "engaged in the same industry, trade, craft, or occupation * * * or has a direct or indirect interest therein." In the Wagner Act Congress omitted both of these provisions which in the Norris-LaGuardia Act precede the definition of "labor dispute" (Section 13 (c)), and arguably, therefore, intended that the "industry, trade, craft, or occupation" criterion should not limit the protection accorded under the Wagner Act. It is unnecessary to reach that question in this case, however, for, as we have shown, Waugh was engaged in the very industry involved in the dispute between the Daily Review Corporation and the Typographical Union, and had at least an "indirect interest" therein. *Supra*, pp. 23–24.

employees could not be discharged for such activity. This indeed is the only function served by Section 2 (9). The term "labor dispute" which is there defined appears nowhere in the Act except in Section 2 (3), and there its express purpose is to preserve the employee status of those who cease to work in connection with such a dispute, and thus to protect them against discharge and other reprisal. Manifestly, it was the purpose of Congress, by including these definitions in the Wagner Act, to guarantee that Section 7 of that Act would not be limited, as the Clayton Act was limited, to the particular employer-employee relationship involved in the primary dispute. It is to this that Judge Learned Hand (who, together with Judge Hough, had formed a majority of the court of appeals in the subsequently reversed *Duplex* decision, 252 Fed. 722, 748) referred when he cited this Court's *Duplex* decision and said: "the [Wagner] act has put an end to this" (*Peter Cailler Kohler* case, quoted *supra*, pp. 22–23).

Viewed against the background of this history, it is apparent that Congress intended by the enactment of Section 2 (3) and (9) to extend the same protection against discharge to employees who engaged in sympathetic work stoppages in consequence of disputes to which they were not immediate parties as it extended to employees who stopped work to win concessions from their own employer. Consequently to hold, as did the

court below, that an act of sympathetic assistance is not protected simply because it involves a stoppage or refusal to work is inconsistent with the purposes and objectives of Congress.

If effect be given to the scheme and structure of these statutory provisions, it cannot be that a refusal to cross a picket line is protected when it occurs during nonworking hours, but not when it occurs during working hours. For if the act is of the character protected by Section 7, then the individual who engages in it is entitled to protection against discharge only if, *vis-à-vis* his own employer, he is an "employee" within the meaning of Section 2 (3). *A fortiori* he is entitled to protection when the act of refusal occurs while he is acting as an employee. By the plain words of the section, the fact that his "work has ceased" *pro tanto* as a consequence of his performance of that act can neither impair his status as an employee nor leave him vulnerable to discharge. Indeed, as we have shown, it was precisely to guard against the possibility of a construction which would withdraw the Act's protection from employees whose exercise of Section 7 rights involved refusal to work, that Congress enacted the explicit provisions of Sections 2 (3) and (9).[10]

[10] The fact that the work stoppage here was partial only—i. e., that Waugh did not refuse all work, but merely refused to do a part of his work taking about 10 minutes a day—does not render Sections 2 (a) and (9) inapplicable. If one

(c) *Refusal to cross a picket line for the purpose of assisting a striking union is a traditional, peaceful labor activity of the kind which Congress deliberately intended to protect.*—The court below failed, we believe, to appreciate that Section 7 does not stand alone in the statute, to be construed at large, but that Sections 7 and 2 (3) and 2 (9) and 8 (a) (1) are interlocked and interpenetrating provisions, which must be construed together to accomplish the results envisioned by Congress. Here again the Norris-LaGuardia Act provides a guide. In Section 4 of the Norris-LaGuardia Act (*infra*, p. 72), Congress had spelled out in detail the activities of employees and labor organizations which the federal courts were forbidden to enjoin. It has been authoritatively stated that this specification was designed "only [to] summarize the conventional tactics of organized labor in its effort to improve its material conditions or to make effective in industry those principles of liberty which are axiomatic in our political life."[11]

In the Wagner Act Congress painted with a broader brush. In describing the area of protected conduct, it used such all-embracing terms as to "assist labor organizations," and to "engage in concerted activities" for "other mutual aid or

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who has ceased work altogether remains an employee, surely one whose work has only partly ceased does also. See further, *infra*, pp. 57–65.

[11] Frankfurter and Greene, *The Labor Injunction*, p. 220.

protection" (Section 7). There can be no doubt however, that this description, like that in the Norris-LaGuardia Act, was designed to cover the same ground, namely, to comprehend the "conventional tactics of organized labor."[12] Thus, in place of the Norris-LaGuardia Act's specific protection of "Ceasing or refusing to perform any work or to remain in any relation of employment" (Section 4 (a)), Congress in the Wagner Act embraced all such activity in the phrases "assist" and "concerted activities," elaborating the meaning of those phrases to the extent it deemed such elaboration necessary in Sections 2 (3) and 2 (9). Such parallelism in defining the area of protected activity effectuates the purpose of Congress in the Wagner Act to accord protection against discharge to employees who engage in the conventional and traditional tactics of organized labor, just as in the Norris-LaGuardia Act it immunized such tactics against judicial restraint.

The courts have recognized that both the Norris-LaGuardia Act and the Wagner Act extended protection to employees who, in consequence of a labor dispute involving their employer's customer or supplier, ceased work for their employer entirely, and thereby engaged in

[12] Cf. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346: "Collective bargaining * * * generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

a secondary boycott.[13] *A fortiori*, the protection of those Acts extended to employees who, like Waugh in the instant case, cease work in consequence of such a labor dispute only to the extent required to enable them to respect a picket line.

B. IN AMENDING THE WAGNER ACT TO WITHDRAW PROTECTION FROM EMPLOYEES WHO ENGAGE IN SECONDARY BOYCOTTS, CONGRESS PRESERVED THE PROTECTION ACCORDED TO EMPLOYEES WHO REFUSE TO CROSS LAWFUL PRIMARY PICKET LINES

We have thus far shown that refusal to cross a picket line was not merely embraced by the language of Section 7, but that it is one of the conventional activities of employees in the field of self-organization and collective bargaining which Congress undoubtedly intended to protect, and that Congress indeed took special pains to protect it by the inclusion of the definitions in Section 2 (3) and 2 (9). In amending the Wagner Act in 1947, Congress did not withdraw this protection, but rather confirmed it.

1. *The nature and scope of the restrictions which Congress placed on sympathetic action by labor unions show that Congress intended to continue the Act's protection of employees who refuse, in the course of their employment, to cross primary picket lines.*—The Congress which passed the Taft-Hartley Act concluded that the time had

[13] As to the Norris-La Guardia Act, see *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, 100–103; *Wilson & Co.* v. *Birl*, 105 F. 2d 948, 952 (C. A. 3); as to the Wagner Act, see *National Labor Relations Board* v. *Peter Cailler Kohler Co.*, 130 F. 2d 503, 506 (C. A. 2).

come to curtail the power of labor organizations to sweep neutral employers into the vortex of labor controversies. (Compare Judge Learned Hand's comment in *Peter Cailler Kohler, supra,* p. 23). It therefore decided to draw a line and to prohibit labor organizations from engaging in sympathetic strike action designed to induce a neutral employer to cease doing business with an employer involved in a labor dispute. But in accomplishing this purpose Congress did not resurrect entirely the philosophy underlying *Duplex Printing Co.* v. *Deering,* 254 U. S. 443. Congress not only left undiminished the list of employee rights specified in Section 7; more significantly, it left intact the statutory definitions of "employee" and "labor dispute," which were intended to overturn the fundamental philosophy of the *Duplex* case. By reenacting these definitions, Congress made it clear that it was not adopting the view that the legitimate interests of employees in the outcome of labor disputes were confined to disputes with their own employer. Rather, in the Taft-Hartley Act, Congress took the view that sympathetic strike action, when carried to the point of seeking to force neutral employers to cease doing business with others, was incompatible with the legitimate business interests of neutral employers and that the public interest in diminishing the spread of industrial strife required that such activities be curbed. Congress met the evil it envisaged, and *pro tanto* limited the scope of

sympathetic concerted activity which had theretofore been protected, by enacting Section 8 (b) (4) (A) to put an end to secondary boycotts. *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 685–687. But the way which Congress chose to restrict the scope of protected sympathetic action, *not* by redefining the rights of employees or the scope of the terms "employee" and "labor dispute," but rather by enacting a new limitation prohibiting certain union action, shows that Congress did not intend to withdraw protection for sympathetic action by employees which does not amount to a secondary boycott as defined by the new Act.

Section 8 (b) (4) (A), by its terms, makes it an unfair labor practice for a labor organization or its agents to engage in or induce employees to engage in "a concerted refusal in the course of their employment * * * to perform any services, where an object thereof is: (A) forcing or requiring any employer * * *. to cease doing business with any other person." Congress did not make it an unfair labor practice for employees to engage in these acts. However, the legislative history indicates that Congress understood that the effect of this prohibition would be to withdraw the protection theretofore enjoyed under the Act from employees who engaged in the proscribed concerted activity.[14]

[14] See the legislative history detailed in *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 260–263, n. 15.

At the same time, Congress was careful to preserve the right to strike (*Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, 389; *Automobile Workers* v. *O'Brien,* 339 U. S. 454, 457), and the right to bring coercive pressure against the primary employer engaged in a labor dispute, by withholding services and by the peaceful tactics which have traditionally accompanied primary strikes, *e. g.,* picketing. Thus, as this Court has stated, it remains "permissible" under the Act, as amended, for a labor organization to picket an employer with whom it is engaged in a labor dispute so as "to influence * * * employees of a customer * * * not to cross the picket line." *National Labor Relations Board* v. *Denver Building Trades Council,* 341 U. S. 675, 687, referring to *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665. By leaving it permissible for labor organizations to induce employees of customers to refrain from crossing a primary picket line, Congress must have intended to preserve the Act's protection for employees who, yielding to this inducement, refused to cross. Congress accomplished the denial of protection to employees who engage in concerted secondary boycotts by forbidding labor organizations to induce employees to engage in that conduct. Obviously, if Congress had intended to withdraw protection from employees who refuse to cross primary picket lines it would similarly have forbidden labor organizations to induce them

to engage in that conduct. Thus, to hold that employees who refuse to cross primary picket lines are not protected is to hold that permitting inducement has precisely the same effect as prohibiting it. Such a holding denies any significance to the statutory scheme which Congress adopted and obliterates the line which Congress drew between primary activity which it desired to protect and secondary activity which it intended to outlaw. See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 669–671, followed in *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 649 (C. A. D. C.), certiorari denied, 342 U. S. 869; *National Labor Relations Board* v. *Service Trades Chauffeurs, Salesmen & Helpers, Local 145*, 191 F. 2d 65, 67 (C. A. 2); *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F. 2d 645, 652–653

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[15] We are aware that in the *Rice Milling* case, *supra*, this Court explained the exemption of primary picketing which induces employees of other employers to refrain from crossing the picket line on the ground that "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscription of § 8 (b) (4) * * *." It is true, of course, in this case, just as in the *Rice Milling* case, that the picketing was not aimed at inducing concerted action by Rockaway's employees. Under this approach, as well, the picketing would not be proscribed by Section 8 (b) (4) and Waugh's response thereto would therefore not be beyond the

(C. A. 6).[15] We cannot believe that Congress intended to permit labor organizations to induce employees of customers to refrain from crossing primary picket lines and at the same time intended to deny protection to employees who yield to such inducement. Just as "the legislative history does not sustain a congressional purpose to outlaw secondary boycotts under § 8 (b) (4) and yet in effect to sanction them under § 8 (c)" (*International Bro. of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, 704), so the legislative history does not sustain a congressional purpose to protect primary picketing but to destroy its potency by rendering unprotected the normal employee response it is largely designed to evoke.

Furthermore, the fact that Congress in the amended Act incorporated Section 2 (3) and (9) without any modification whatever, demonstrates conclusively, we submit, that Congress intended to continue to protect employees who refuse to cross primary picket lines. For the prohibition of secondary boycotts, and the conse-

[15] (Continued)
bounds of the Act's protection. As we understand it, what this Court held in the *Rice Milling* case is that whether inducement to refrain from crossing a primary picket line is directed at a customer's employees individually or collectively, the sympathetic action which it is designed to evoke is not sufficiently "concerted" to come within the ban of Section 8 (b) (4). It is, of course, however, action in concert with the pickets, within the protection of Section 7, and in any event assists the striking labor organization within the meaning of that Section. See note, 5, *supra*, pp. 21–22.

quent withholding of protection from employees who engage in them, leaves no scope of operation whatever for part of Section 2 (3) or any of Section 2 (9) unless they embrace the refusal of employees to cross primary picket lines. Thus, there is only one situation in which employees, who in concert cease work in consequence of a labor dispute to which neither they nor their employer is a party, do not engage in a prohibited secondary boycott, and that is where their cessation of work is caused by and is limited to refusal to cross a primary picket line. In that situation, their cessation of work is as much a part of the primary dispute as the picket line which induced it; it is no more their object than it is the object of the pickets to induce their employer (the customer) to cease doing business with the picketed employer. Thus, refusal to cross a picket line remains under the amended Act a permissible and protected act of assistance and a concerted activity for mutual aid when performed in connection with a primary strike.

2. *Specific provisions added by the amended Act reveal Congress' understanding that refusal to cross a primary picket line remains protected.*—This conclusion, moreover, is reinforced by the specific provisions of the amended Act. Congress wrote a special provision to assure that its prohibition of secondary boycotts should not be read as diminishing the right of employees to respect picket lines under the circumstances here

present. The final proviso to Section 8 (b) (4) declares that—

> nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act.

This proviso demonstrates that Congress did not intend that its ban of secondary boycotts should result in denying the protection of Section 7 to individuals who refused to cross primary picket lines and to that extent only refuse to render service to their own employer. Furthermore, since the proviso is attached to a provision which prohibits only a refusal to perform services "in the course of [his] employment" (Section 8 (b) (4), initial clause) there can be no suggestion that the only refusals which Congress thus protected, were those which occurred outside of working hours and therefore involved no refusal to perform services at all.[16]

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[16] Respondent argued in the court below that to read the proviso as protecting employees who refuse to cross picket lines under the circumstances therein detailed would cast upon the employer the burden of determining whether the primary strike satisfied the requisites of the proviso. In the first place we do not believe that the right to refuse to cross primary picket lines is necessarily limited to situations which fall within the terms of the proviso. We do say that inclu-

Final proof that Congress intended in the Taft-Hartley Act to protect refusal during working hours to cross a picket line lies in the scope of the new "right" created in Section 7 of that Act—the right *to refrain from* activities protected by Section 7. In the original Wagner Act, Section 7 spelled out the rights of employees to assist labor organizations, to engage in concerted activities, *etc.*, and Section 8 (1) forbade employers to interfere with those rights. In the Taft-Hartley Act, however, Congress added to the "rights" contained in Section 7 "the right to refrain from any or all of such activities," and thus guaranteed the right *not* to assist labor organizations or to engage in concerted activities, *etc.* Congress then implemented that right by enacting Section 8 (b) (1) (A), which forbids a labor organization to restrain or coerce employees in the exercise of their rights. As stated

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sion of the proviso is one of several indications that Congress was intent upon retaining protection of the right to refuse to cross picket lines, and that, even standing alone, the proviso protects such refusals, to the extent that the requirements of the proviso are met, as they were in this case. Even assuming that the protection is as narrow as the proviso, it cannot be relevant that the effect of according that protection is to require an employer who desires to discharge an employee for refusing to cross a picket line to ascertain whether or not the conditions which establish protection are present. To hold, in accordance with respondent's view, that an employer may discharge an employee for his assistance to another union regardless of whether the conditions envisioned by the proviso are met, is to destroy entirely the protection granted by the proviso.

by Senator Taft in his analysis of the Act, Congress intended to "make the prohibition contained in section 8 (b) (1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or a picket line." 93 Cong. Rec. 6859; 2 Leg. Hist. 1623. This Court similarly recognized in *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, 672, that Sections 7 and 8 (b) (1) (A) protect employees who desire to cross picket lines from restraint and coercion at the hands of labor organizations. The Board has consistently so held."[17]

But if—as Congress intended and this Court and the Board have held—the amended Act protects employees against coercion by unions which seek to compel them to respect picket lines, the statutory warrant for this protection can only be found in that part of Section 7 which guarantees "the right to refrain from" the activities protected by that Section. In other words, the right to cross a picket line free from union coercion is protected only because its converse, the right *not* to cross, is protected against employer coercion. In the instant case, had Waugh determined to cross the picket line, the striking union, had it coerced him into respecting the line, would

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[17] *Medford Building Trades Council*, 96 N. L. R. B. 165, 166, n. 3, 176; *International Longshoremen's Union*, 79 N. L. R. B. 1487, 1504; *United Construction Workers*, 94 N. L. R. B. 1731, 1733.

have violated Section 8 (b) (1) (A) by restraining the exercise of his right not to assist the union or engage in concerted activities. The statute protects the employee's freedom to choose whether or not to assist the union; Waugh in choosing to assist it was protected against respondent's reprisal, as he would have been protected against union reprisal had he chosen to exercise his converse right.

In sum, analysis of the Taft-Hartley Act shows Congress' intent that the form of assistance and concerted activity undertaken by Waugh in this case should continue to enjoy the protection of the Act. The retention of the broad definitions of "employee" and "labor dispute," the method adopted to limit the precise kind of sympathetic concerted activity which Congress desired to discourage, the terms of the proviso to Section 8 (b) (4), the continued protection of primary picketing, the scope of the correlative right newly conferred by Section 7, as amended, to refrain from assisting a union or engaging in concerted action, all reveal Congress' understanding that the Act protects employees who in the course of their employment refuse to cross a lawful picket line.

C. THE REASONS ADVANCED BY THE COURT BELOW FOR CONCLUDING THAT THE STATUTE DOES NOT PROTECT REFUSAL TO CROSS A PRIMARY PICKET LINE DURING WORKING HOURS ARE UNSOUND

For the reasons already indicated, we believe that Congress itself has struck the balance be-

tween the right of employees who are not immediate parties to a dispute with their own employer to engage in sympathetic action in support of other striking unions on the one hand, and the right of such neutral employers to be relieved of strike pressure designed to force them to cease doing business with other employers on the other. While limiting the right of employees to engage in secondary strike action, Congress decided that the right of employees to refuse to cross primary picket lines should be preserved and protected, and in doing so we believe it necessarily intended that the exercise of that right during working hours be protected. The court below, however, viewed the question under what circumstances protection should be accorded to employee refusals to cross primary picket lines as one which Congress had left open, and which the Board and the courts were therefore free to decide on the basis of their own balancing of the competing considerations. We believe that even on this assumption the court below erred in denying any protection to such a refusal occurring during working hours, for the considerations upon which it predicated its conclusion are inapplicable and inappropriate to the resolution of this question.

1. *The distinction between working and nonworking time cannot be applied to the right to refuse to cross picket lines.*—To support its theory that the protection which Section 7 extends

to employees who respect picket lines is limited to those who exercise that right outside working hours, the court below relied on this Court's observation in *Republic Aviation Corp. v. National Labor Relations Board*, 324 U. S. 793, 798, that the rights protected by Section 7 "are not unlimited" and on the Board's holding in *Peyton Packing Co.*, 49 NLRB 828, 843, approved in the *Republic Aviation* case, that solicitation of union membership may, absent special circumstances, be prohibited during working hours. We submit that the court below misconstrued and misapplied the *Republic* case, and that the very reasons which underlie the rule as to solicitation of union membership require reversal of the decision below.

In the *Republic* case, this Court recognized that the rights guaranteed employees by the Act were meaningless unless the Act also assured adequate opportunity to exercise them. In determining how far organizational opportunity should be extended it was pertinent, of course, to consider the impact of such extension upon competing interests of the employer. "Opportunity to organize and proper discipline are both essential elements in a balanced society." 324 U. S., at 798. In the *Republic* case the Court approved the Board's determination that, insofar as the right to solicit union membership on the employer's property is concerned, the balance is appropriately struck by permitting solicitation during non-working time while disallowing it during working

time. Since there would ordinarily be ample opportunity to engage in organizational activity outside of working hours, both on and off the employer's premises, this resolution of the conflicting interests was thought to give full protection to the right to organize which the Act was intended to protect and foster.

However, to impose the "same limitations" upon the very different right to refuse to cross primary picket lines, as the court below did (R. 76), is to destroy virtually any opportunity to exercise that right, and thereby to repudiate the basic principle which the *Republic* case vindicates. That case clearly was not intended to draw a universally applicable "distinction between union activities by an employee during working time in violation of the employer's rules and such activities on the employee's own time" (R. 76). A strike, for example, necessarily involves violation of the employer's rules; yet it would hardly be suggested that the right to strike is protected only if it is exercised outside working hours. The right, as an employee, to respect a primary picket line is analogous, in this respect, to the right to strike and in sharp contrast to the right to solicit union membership, in that it can ordinarily be exercised only during working hours. Indeed, unless the employee's right to respect picket lines is protected when exercised during working hours, it is not protected by the Act at all (see p. 32, *supra*), for when employees respect picket lines

outside of working hours they act not in their capacity as "employees" but only as consumers. Correlatively, the right of the picketers "to influence employees of a customer * * * not to cross the picket line" *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 687, would be nugatory if employees could be discharged for responding, *as employees*, to such inducements.

Accordingly, if the Act protects refusals to cross primary picket lines, that protection, like the protection extended to strikes and other concerted activities, must exist when the refusals, like the strikes, occur during working hours.[18] Of course, a refusal to cross a picket line during working hours may entail disobedience of the employer's instructions, and interfere to some extent with the employer's business. Similar, and far more drastic, consequences attend a strike, but it has never been held that they warrant denial of the Act's protection to strikers. See *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641 (C. A. 5); *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817 (C. A. 3). In strike cases, where the employee's statutory right can

[18] Cf. *National Labor Relations Board* v. *Kennametal*, 182 F. 2d 817 (C. A. 3); *Olin Industries, Inc.*, v. *National Labor Relations Board*, 191 F. 2d 613, 192 F. 2d 799 (C. A. 5), certiorari denied, 343 U. S. 919; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C. A. 5); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. 2d 714, 717–718 (C. A. 8).

effectively be exercised only during working hours, and the exercise necessarily involves interruption of the employer's business, it has long been settled that the conflicting interests are to be reconciled by permitting the employer to continue production by replacing the recalcitrant employees, but precluding him from severing their employment until they have been replaced. *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 345–346; *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C. A. 9), and cases cited therein. As the court observed in the *Globe* case, "the authorities uniformly hold that the discharge of economic strikers prior, as here, to the time their places are filled constitutes an unfair labor practice." Such a resolution of the conflicting interests, which has become well settled in cases where the exercise of employee rights results in a total stoppage of work, would seem, *a fortiori*, to afford the maximum protection to which the employer is entitled where the exercise results in only a partial cessation of work."[19]

Consequently, the Board, applying the principles laid down in the *Republic* case, while recognizing that employees have the statutory right to assist a striking labor organization by refusing to cross its picket lines, but also recognizing that the employer has a right to continue production, concluded that these rights could best be mutually

[19] Cases cited, note 18, *supra*, p. 49. See also, 66 Harv. L. Rev. 363–365; 52 Col. L. Rev. 934–936.

accommodated by protecting the employee from discharge but permitting the employer to replace him, precisely as in the case of an economic striker.[20] The court below misapplied the principles of the *Republic* case; instead of preserving and accommodating the conflicting rights, the court below resolved the issue by limiting the employee's free exercise of his right to non-working hours. In this context, unlike the "solicitation" context of the *Republic* case, such a limitation virtually extinguishes the employee's right.

2. *The court below failed to appreciate the rationale and the applicability of the settled distinction between replacement and discharge of employees who occupy the legal status of economic strikers.*—The Board recognized that respondent was under no obligation to permit Waugh to work at all as long as he refused to cross the picket line. This was because, in the Board's view, by refusing to cross the picket line Waugh had placed himself in the same legal status as an economic striker to whom the employer is under no obligation to offer work unless and until the striker waives his demands and offers unconditionally to return to work on the

[20] The term "economic striker" is used in this brief to describe an employee who goes on strike solely to further a legitimate economic objective, in contra-distinction to an "unfair labor practice striker" who strikes to protest an unfair labor practice.

employer's terms.[21] The Board also held that whether or not respondent elected to refuse to permit Waugh to work at all as long as he refused to cross the picket line, it was free to replace him until he abandoned his refusal, but it was not free to discharge him until he had been replaced.

In describing as "wholly unrealistic" (R. 78) this distinction between an employer's right to discharge an employee who is engaged in a protected concerted activity and the right to replace him, the court below held inapplicable a doctrine long settled and uniformly applied in the case of economic strikers.[22] The reason for the rule finds its roots in the fundamental policy of the Act: an employee has the right to engage in concerted activities, and the employer may not inhibit the exercise of that right by punishing the employee with discharge, thereby signifying to all his employees that their employer will visit immediate and drastic consequences on their attempts to exercise their statutory rights. The employer's right to replace an economic striker exists because the employer has a right to continue production, and because the replacement is made for that

[21] *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752 (C. A. 9).

[22] The Ninth Circuit in the *Globe Wireless* case, *supra*, 193 F. 2d, at 750, observed that "the authorities uniformly [so] hold," and cited seven of what it termed "the numerous * * * holdings to this effect."

purpose rather than for the purpose of intimidating employees in the exercise of their rights.

This distinction between replacing and discharging an economic striker has important practical consequences to the striker himself. As a striker he continues to be an "employee" within the meaning of Section 2 (3) of the Act, and is entitled to be reinstated if he has not been replaced. Consequently he may at any time prior to replacement abandon his strike and be assured of his job. This protection is necessarily inherent in the employee's initial exercise of his right to strike, for the Act's guarantee of the right to engage in concerted activity, and the preservation of his status as an employee (Section 2 (3)), would be meaningless if the exercise of the right could be met with immediate discharge.[23] Moreover, the effect of the discharge is to notify the employee that he will not be reinstated, thus encouraging him to prolong rather than to abandon the strike, a result hardly consistent with the express purposes of the Act.

It is no less "realistic" and important to apply the distinction between discharge and replacement to an employee who refuses to cross a primary picket line, than to an economic striker. Just as the distinction affords the economic striker an opportunity to terminate the strike before he is

[23] *J. A. Bentley Lumber Co.* v. *National Labor Relations Board*, 180 F. 2d 641 (C. A. 5).

replaced, so it affords the employee an opportunity to abandon his refusal to cross the picket line before his employer has hired a replacement. In one case, as in the other, this opportunity for the employee to preserve his job by terminating his work stoppage before replacement, is an indispensable element in the protection which the Act accords to the exercise of the rights it safeguards.

3. *The court below failed to perceive the distinction between the lawful conduct of supporting a primary strike by refusing to cross a picket line at the plant of the struck employer and the unlawful conduct of engaging in a secondary boycott.*—The court below professed itself unable to "follow the Board's reasoning" that respondent could have treated Waugh as a striker, arguing that if Waugh had gone on strike to prevent his employer from dealing with the picketed Daily Review plant, Waugh's union could not have supported his strike without violating Section 8 (b) (4) of the Act. (R. 77–78). Even if this were so, it would not make a strike by Waugh unlawful. Moreover, contrary to the assumption of the court below, it may well be that under the proviso to Section 8 (b) (4) Waugh's union could legitimately have urged its members to join Waugh in refusing to cross the primary picket line at the Daily Review plant,

just as the Typographical Union could lawfully have urged the employees of Rockaway to do so, although neither union could lawfully have urged them to strike against Rockaway News. Thus, although the Board has not yet construed the proviso, the proviso may permit a labor organization to induce or encourage its members to refrain from crossing a primary picket line authorized by another labor organization entitled to recognition at the premises of another employer. And this result may follow, in any event, from the distinction which Congress drew in Section 8 (b) (4) between primary and secondary strike activity. Cf. *Newspaper and Mail Deliverers' Union, etc.*, 90 N. L. R. B. 2135, 2146–2149. Thus, it may be that under Section 8 (b) (4), Waugh's union would not have violated the Act had it encouraged its members to support Waugh by respecting the picket line as he did.[24]

The failure of the court below to consider these aspects of Section 8 (b) (4) led the court mistakenly to assume that "it is inconceivable that Waugh could have won his strike" (R. 78). Obviously, if all of Waugh's fellow workers could have been persuaded, either by their own union or by the pickets, to refrain from crossing the

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24/ (See next page).

Daily Review picket line, Rockaway News might well have been unwilling or unable to replace them all, and therefore have permitted the employees to continue work while respecting the picket line. Since lending this assistance to the Typographical Union was the only goal of Waugh's "strike," it is therefore by no means "inconceivable" that Waugh could have won it.

Moreover, even assuming that Waugh's "strike" was foredoomed to failure, this would afford no basis for denying him the protection of the Act. The potential success of assistance which an employee offers a labor organization is no more a permissible criterion of the Act's protection than is the potential success of a strike a permissible criterion of the protection accorded the striker. Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344.

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[24] To be sure, respondent could lawfully have converted such a limited refusal to perform services into a complete work stoppage by denying Waugh and any other employees who respected the picket line the opportunity to perform those other duties they were willing to perform. But in such event the resultant work stoppage would not have been a "concerted *refusal* * * * to perform * * * services" within the meaning of Section 8 (b) (4), for the only service the employees would be *refusing* to perform would be that specifically protected by the proviso. Moreover, although the employer may refuse to permit employees to perform services they are willing to perform, he cannot thereby transform their lawful object—a refusal to cross a picket line—into an unlawful one.

4. *The court below failed to appreciate that the purpose of an employee who refuses to cross a picket line at the plant of his employer's customer is to lend assistance to the strikers, and not unilaterally to "dictate the terms of his employment."*—As additional support for its view that the statutory protection of the right to respect picket lines exists only outside working hours, the court below stated that "To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do" (R. 76). This contention, as we shall now show, rests both upon a misconception of the objective which underlies employee refusals to cross picket lines, and upon a misreading of the so-called "partial strike" cases relied on by the court below.

The employee who voluntarily refuses to cross a picket line does so, not in order to change or "dictate the terms of his employment," but to assist the picketing union (pp. 19–24, *supra*). His goal is the same as it would be if, as a consumer outside working hours, he similarly refused to cross a picket line. When the refusal occurs during working hours, it entails non-performance of a part of his duties. But this is a consequence, not an aim of his conduct. For this reason cases like *Conn* v. *National Labor Relations Board*, 108 F. 2d 390, 397 (C. A. 7), upon which the court

below relied, are wholly inapposite. In the *Conn* case, employees whose demand for overtime pay had been rejected simply walked out of the plant at their usual quitting time though they had been scheduled to work overtime. They returned to work the following morning, but there was evidence that they intended to follow the same course each evening until their request was granted. Holding that the discharge of these employees was not violative of the Act, the court said (108 F. 2d, at 397):

> We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.

This language and the facts to which it relates demonstrate the error of the court below in relying upon the *Conn* case here. The factor of importance in *Conn* was that the employees, by unilaterally fixing their hours of employment, sought to arrogate to themselves the employer's right

to manage his business. They had a right to demand that the employer exercise his managerial rights in accordance with their desires; they could have struck to enforce their demand. But the employer had a right to resist. And when their concerted action consisted of an attempt to run the business as they saw fit—as if their rejected demand had been granted—the court concluded that the employer could defend his managerial rights by discharging them.

That the *Conn* decision was not intended to lay down a rule that an employee's refusal to perform some of the duties assigned to him cannot be a protected activity is made clear by the same court's decision written by Mr. Justice (then Judge) Minton in *Rapid Roller Co.* v. *National Labor Relations Board*, 126 F. 2d 452, 460–461 (C. A. 7), certiorari denied, 317 U. S. 650. There, persons employed as laboratory assistants were asked to work in the company's factory during a strike of the factory employees. Though they were not members of the striking union, the laboratory assistants refused to act as "strikebreakers" by performing the factory duties the company had asked them to assume. Like Waugh in the instant case, they did not walk off the job or formally "strike" in the sense of being unwilling to work at all. Nevertheless, although their action amounted to what the court below would term an attempt "unilaterally to dictate the terms of [their] employment," the court whose *Conn* deci-

sion is invoked for this suggestion had no hesitation in finding that their discharge was an unlawful reprisal "because of their sympathy for the union."

The similarity of the instant case to *Rapid Roller Co.* and its decisive difference from *Conn* are, we believe, plain. Here, as in the *Rapid Roller* case, the employee withheld his labor to the extent necessary to give his support to and demonstrate his "sympathy for the union." Here, unlike *Conn*, there was no attempt to usurp management's right to run its business. Waugh sought no change, by his refusal to cross the picket line, of his own terms of employment. The elimination of part of his duties was in no sense an objective in itself. His "strike" was "partial" only because of the fact that his respect for the picket line affected only part of his work. This fortuitous circumstance affords no basis for denial of the protection Waugh would have received had the picket line been so situated as to cause his complete cessation of work. See *Cyril de Cordova & Bro.*, 91 N. L. R. B. 1121, 1135–1137.[25]

[25] The court below also relied on two Eighth Circuit cases, *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 496, and *National Labor Relations Board* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103, 108. Neither case is in point. In *Kopman*, as in *Conn*, the employee in refusing to perform certain work was in fact attempting to prescribe the terms on which he would work. In *Montgomery Ward*, the employer told the employees who refused to work on "struck" goods that they would have to do the work or leave the plant, *i. e.*, assume the position of

Nothing in the Act suggests that a "partial strike" merely because it is "partial" forfeits statutory protection. On the contrary, the Act's paramount objective—"to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred" (Sec. 1, Wagner Act)—is best served wherever the paralyzing effects of work stoppages can be minimized or eliminated. In the absence of circumstances which for some other reason warrant withdrawal of the Act's guarantees, there is nothing to the suggestion that an employee's cessation of work is unprotected unless it amounts to a "strike" in the standard sense of the word.

In *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C. A. 3), where such a suggestion was made, it was shortly and decisively rejected. Approving the Board's decision that employees were protected against discharge for conducting a work stoppage during working hours in order to present grievances to their employer, the court said (182 F. 2d 819):

> * * * That the employees suddenly dropped their tools and insisted upon presenting their grievances during working hours does not detract from the lawfulness

full-fledged strikers. Only when they refused both alternatives were they discharged. 157 F. 2d, at 496. Respondent here summarily discharged the employee without giving him the alternative of being treated as an economic striker.

> of their conduct. Certainly the statute would have protected them against interference or coercion if instead of insisting upon immediate discussion of their demands they had then and there left the plant and formed a picket line outside. *In fact, what the workmen did was more reasonable and less productive of loss to all concerned than an outright strike.*
>
> The language of the Act does not require and its purposes would not be served by holding that dissatisfied workmen may receive its protection only if they exert the maximum economic pressure and call a strike. [Italics added.]

To hold that workers must cease work altogether and engage in a "total" strike in order to be protected by Section 7 would not only rewrite the statute and thwart Congress' policies, but would lead to palpably absurd results in at least some cases. For example, it is well known that in such industries as steel manufacturing, preservation of life and property demands that plants be manned for emergency operations during a strike.[26] If, in recognition of this need, strikers remain at work to perform only the tasks necessary to preserve the plant and avoid human injury, it could scarcely be said that such employees should be denied the protection of the Act because they are "partial" strikers. Con-

[26] See *Albrecht* v. *National Labor Relations Board*, 181 F 2d 652 (C. A. 7).

doning the discharge of these employees on the ground that they ought to have deserted the plant entirely would sacrifice obvious considerations of practical sense to the baseless supposition that Congress intended to foster all-out industrial warfare.

We submit, in short, that the view that partial cessations of work are necessarily unprotected by the Act is without substance. If anything, the precisely contrary view would have far more merit, for Section 7 literally covers all forms of assistance to labor organizations and other concerted activities. The fact is, however, that the extent of a work stoppage can never, by itself, be determinative of its protected or non-protected character under the Act. Thus, a "total" strike, like a "partial" strike, may be unprotected because it is in breach of contract [27] or is other-

[27] *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332. Respondent contended in the court below that Waugh's refusal to cross the picket line violated the "no-strike" clause in respondent's contract with Waugh's union. The argument falls for several reasons. First, the contract itself was set aside in its entirety as invalid by the Board—properly, as the decree in *Gaynor News*, *supra*, establishes. See p. 8, n. 2, *supra*. Second, the proceedings of the Arbitration Board to which Waugh's union complained in his behalf, establish that that Board viewed Waugh as violating not the "no-strike" clause (Section 19–n of the contract) but only Section 4 dealing with the right of foremen to issue orders (R. 69, 25–26). Indeed, it seems clear that Waugh did not violate the "no-strike" clause, which provided that "no strikes * * * shall be ordered or sanctioned by any party hereto" (R. 61), for that clause refers only to strikes

wise unlawful [28]—or because it constitutes so gross a departure from the duties of employees to both their employer and the public as to justify withdrawal of the normal safeguards against employer reprisals for concerted activities.[29] The question in every case is, not whether the employees have wholly abandoned their work, but whether the "particular activity was so indefensi-

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against Rockaway News and does not refer to refusals by employees individually to cross picket lines at the plant of other employers, refusals which have no purpose to gain concessions from Rockaway News.

Respondent also contended below (1) that the failure of the contract to contain a clause, once proposed during the contract negotiations, expressly recognizing the right to respect a picket line shows that the right was waived, and (2) that the determination of the Arbitration Board rejecting Waugh's grievance was binding. However, the silence of the contract on the right to cross a picket line cannot be construed as a waiver of a right created by statute, and under Section 10 (a) of the Act the Board's exclusive power to prevent unfair labor practices cannot be "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." See *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262 (C. A. 3), as modified, 120 F. 2d 266, certiorari denied, 314 U. S. 693; *National Labor Relations Board* v. *Walt Disney Products*, 146 F. 2d 44, 47–48 (C. A. 9), certiorari denied, 324 U. S. 877; *National Labor Relations Board* v. *International Union, etc., Local 291*, 194 F. 2d 698, 702 (C. A. 7).

[28] *E. g., National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31.

[29] *Albrecht* v. *National Labor Relations Board*, 181 F. 2d 652 (C. A. 7); *Underwood Machinery Co.*, 74 N. L. R. B. 641, 646.

ble, under the circumstances, as to warrant" the employer's infliction of penalties therefor.[30]

Here, the answer to this question is a simple one. Far from being an attempt to usurp management's rights or from being in any other respect remotely describable as "indefensible," Waugh's refusal to cross a picket line was a normal, traditional, expectable method of acting to assist the strikers.[31] The fact that this required his refusal to perform only a five- or ten-minute portion of his daily duties would appear to have made his action less troublesome to respondent than a total cessation of work. Far from being an attempt "unilaterally to dictate the terms of his employment" (R. 76) Waugh's action represented only the traditional means by which a union man assists a striking union and makes common cause

[30] The quoted language, from *Harnischfeger Corp.*, 9 N. L. R. B. 676, 686, is part of a passage quoted, with apparent approval, in *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 256.

[31] Insofar as the protected character of the activity is concerned, the traditional, legitimately motivated refusal to cross a picket line which is here involved is to be contrasted with the "recurrent or intermittent unannounced stoppage of work to win unstated ends," a "new technique for bringing pressure on the employer" which this Court held unprotected in *Auto. Workers* v. *Wisconsin Board*, 336 U. S. 245, 249, 264.

with the strikers. As such it falls squarely within the protection of Section 7 of the Act.[32]

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed, and the decision of the Board enforced.

Respectfully submitted.

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[32] Respondent's discharge of Waugh for assisting the striking Typographical Union lessened that Union's chances of prevailing in its strike and thus discouraged membership therein in violation of Section 8 (a) (3). Moreover, the Board's order directing Waugh's reinstatement with back pay is appropriate even if the discharge be viewed as violating only Section 8 (a) (1). *National Labor Relations Board* v. *Vail Mfg. Co.*, 158 F. 2d 664, 667 (C. A. 7), certiorari denied, 331 U. S. 835; *Gullett Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499, 502 (C. A. 5).

APPENDIX

The relevant provisions of the original National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*), and of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 141 *et seq.*), are as follows: [1]

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

[1] The provisions of the original Act here reprinted were reenacted in the amended Act with certain additions. The added phrases are here printed in italics except for Section 8 (b) which appears only in the amended Act. Phrases omitted from the amended Act are printed in brackets.

conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other* concerted activities, for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).*

Unfair Labor Practices

SEC. 8. (*a*) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(*b*)[2] It shall be an unfair labor practice for a labor organization or its agents—

[2] All of Section 8 (b) was created by the amended Act.

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to

recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power [shall be exclusive, and] shall not be affected by any other means of adjustment or prevention that has been or may be estab-

lished by agreement, [code,] law, or otherwise * * *.

* * * * *

(c) * * * If upon [all] *the preponderance of* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action [,] including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board [as to the facts,] *with respect to questions of fact* if supported by *substantial* evidence[,] *on the record considered as a whole* shall be conclusive.

The relevant provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 101, *et seq.*), are as follows:

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified; regardless of any such undertaking or promise as is described in section 3 of this Act.

* * * * *

SEC. 13. When used in this Act, and for the purposes of this Act—

* * * * *

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

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